(2)

Supreme Court, U.S.
FILED
DEC 13 1995
CLERK

No. 95-793

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA, and
CSX TRANSPORTATION, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CSX TRANSPORTATION, INC.

JAMES D. TOMOLA
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3674

JAMES S. WHITEHEAD
(Counsel of Record)
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703
Attorneys for Respondent
CSX Transportation, Inc.

December 1995

31pp

QUESTIONS PRESENTED

1. Did the Interstate Commerce Commission act arbitrarily or capriciously or commit an abuse of discretion when, in accordance with its established, judicially approved practice of requiring that disputes over the interpretation of its labor protective conditions be resolved initially through arbitration, it dismissed Petitioner's request that its dispute with CSX Transportation over the calculation of employee displacement allowances be decided by the Commission in the first instance and required Petitioner to submit the dispute to arbitration?

2. Did the Interstate Commerce Commission act arbitrarily or capriciously or commit an abuse of discretion when, in accordance with its established, judicially approved standards for review of arbitration awards arising under its labor protective conditions, it affirmed an arbitration award that approved CSX Transportation's exclusion of extraordinary, transaction-related overtime earnings from the computation of average monthly compensation for displaced employees under the Commission's *New York Dock* Conditions?

LIST OF PARTIES

The parties to the proceedings in the court below appear in the caption. Respondent CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Contents iii

Authorities iv

Opinions Below 2

Statement of Jurisdiction 2

Statutes and Regulations Involved 2

Statement of the Case 2

Summary of the Argument 8

Reasons for Denying the Writ 9

I. ATDA HAS NOT IDENTIFIED ANY ISSUE CONCERNING THE COMMISSION'S INITIAL REFERRAL OF THIS DISPUTE TO ARBITRATION THAT WARRANTS THIS COURT'S REVIEW 9

II. THE ICC PROPERLY DETERMINED THAT TRANSACTION-RELATED OVERTIME EARNINGS SHOULD BE EXCLUDED FROM THE CALCULATION OF DISPLACEMENT ALLOWANCES UNDER THE COMMISSION'S *NEW YORK DOCK* CONDITIONS 13

Conclusion 19

Appendix A

New York Dock Conditions, Art. I, §§ 1(b) and 11 ..... 1a

Administrative Procedure Act, 5 U.S.C. § 706(2)(A) 3a

AUTHORITIES

CASES — *Page*

American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532 (1970) 10, 13

American Train Dispatchers Assn. v. CSX Transp., Inc., 9 I.C.C.2d 1127 (1993) 6

American Train Dispatchers Assn. v. ICC, 949 F.2d 413 (D.C. Cir. 1991) 4

Bell v. Western Md. Ry., 366 I.C.C. 64 (1981) 11

Brotherhood of Loco. Eng'rs v. Chicago & N.W. Transp. Co., 366 I.C.C. 857 (1983) 11

Brotherhood of Loco. Eng'rs v. ICC, 808 F.2d 1570 (D.C. Cir. 1987) 12

Brotherhood of Maint. of Way Emp. v. ICC, 920 F.2d 40 (D.C. Cir. 1990).....12

Chicago & N.W. Transp. Co.–Abandonment, 3 I.C.C.2d 729, 735-36 (1987), *aff'd sub nom. International Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988)..... 6, 10, 11

Chicago, R. I. & G. Ry. Co. Trustees Lease, 230 I.C.C. 181 (1938).....14

Chicago, R. I. & G. Ry. Co. Trustees Lease, 233 I.C.C. 21 (1939).....15

Cooper v. Penn Cent. Transp. Co., 342 I.C.C. 459 (1972) 11

Ehlert v. United States, 402 U.S. 99 (1971).....13

Great N. Pac.–Merger–Great N., Fin. Doc. No. 21478 (Sub-No. 6)(served Dec. 11, 1986 & April 5, 1988), *aff'd sub nom. Landis v. Burlington N. R.R.*, 930 F.2d 748 (9th Cir. 1991).....7

International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) 6, 12

Leavens v. Burlington N., Inc., 348 I.C.C. 962 (1977).....11

Lyng v. Payne, 476 U.S. 926 (1986).....13

Martin v. OSHRC, 499 U.S. 144 (1991)..... 13

McCarthy v. Bronson, 500 U.S. 136 (1991).....17

Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)..... 9

New York Dock Ry.–Control–Brooklyn Eastern Dist. Term., 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979).....2, 14

NLRB v. Monsanto Chem. Co., 205 F.2d 763 (8th Cir. 1953)..... 10

Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of America, Inc., 423 U.S. 12 (1975).....13

Oklahoma Ry. Co. Trustees Abandonment of Operations, 257 I.C.C. 177 (1944).....14

Public Citizen v. United States Dept. of Justice, 491 U.S. 440 (1989).....17

Southern Pacific Transp. Co. v. Young, 890 F.2d 777 (5th Cir. 1989).....12

Southern Ry.–Control–Central of Ga. Ry., 317 I.C.C. 557 (1962).....14, 15

Southern Ry.–Control–Central of Ga. Ry., 317 I.C.C. 729 (1963).....15

Southern Ry.–Control–Central of Ga. Ry., 331 I.C.C. 151 (1967).....14

Thomas Jefferson Univ. v. Shalala, 114 S.Ct. 2381 (1994)..... 8

United States v. American Trucking Assn., 310 U.S. 534 (1940)..... 17

United States v. Lowden, 308 U.S. 225 (1939)..... 15

United Transp. Union v. United States, 905 F.2d 463 (D.C. Cir. 1990)..... 12

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)..... 10

Walsh v. United States, 723 F.2d 570 (7th Cir. 1983) 12

STATUTES

Administrative Procedure Act, 5 U.S.C. § 706(2)(A)..... 2, 9

49 U.S.C. § 11347..... 2, 17, 18

OTHER AUTHORITIES

Appendix C-1 Conditions..... 17

New York Dock Conditions..... *passim*
Article I, § 1(b)..... 2, 8, 16, 17
Article I, § 5(a)..... 2, 3, 7, 15, 16
Article I, § 11..... 2, 9
Article I, § 11(a)..... 4

Washington Job Protection Agreement..5, 14, 16, 18

No. 95-793

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA, and
CSX TRANSPORTATION, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CSX TRANSPORTATION, INC.

TO THE HONORABLE SUPREME COURT:

Respondent, CSX Transportation, Inc. ("CSXT"), respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, American Train Dispatchers Association ("ATDA").

OPINIONS BELOW

The opinions below are correctly stated in the petition.

STATEMENT OF JURISDICTION

The grounds on which this Court's jurisdiction is invoked are correctly stated in the petition.

STATUTES AND REGULATIONS INVOLVED

49 U.S.C. § 11347 and Article I, § 5(a) of the *New York Dock* labor protective conditions[1] are set forth in the Petition at 2-4. Article I, §§ 1(b) and 11 of the *New York Dock* Conditions and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), are set forth in Appendix A to this Brief in Opposition ("CSXT Brief in Opp. App. A").

STATEMENT OF THE CASE

1. *The Genesis of the Dispute.* From 1980 to 1987 the ICC approved several consolidation applications filed by CSXT or its predecessor rail carriers and imposed its standard *New York Dock* labor protective conditions as required by 49 U.S.C. § 11347. Pet. at 3. On February 1, 1988, after reaching an implementing agreement with ATDA in accordance with the *New York Dock* Conditions, CSXT began consolidating its train dispatching functions in Jacksonville, Florida, which caused

---

[1] *New York Dock Ry.--Control--Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60, 84-90 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979).

dispatchers throughout the CSXT rail system to work an abnormally high number of overtime hours. Pet. App. 52a.

Under *New York Dock*, an employee transferred into a lower paying position as a result of a rail consolidation is entitled to receive a displacement allowance for up to six years. In each month during this protected period, the railroad must pay such employee the difference between his actual earnings and the "average monthly compensation" he received during his so-called "test period" prior to being affected by the consolidation. *New York Dock*, Art. I, § 5(a); Pet. at 3-4.

In February, 1989, CSXT computed the average monthly compensation (also known as the "test period average") of each dispatcher affected by the consolidation. In those instances in which CSXT found that the employee had worked extraordinary overtime hours during his test period as a result of the consolidation, CSXT deleted such extraordinary overtime hours and associated earnings from the employee's test period average. Pet. App. 53a & n.6.

Subsequently, several ATDA members challenged the test period averages CSXT had calculated, including John P. Barr, a dispatcher in CSXT's Evansville, Indiana, office. Barr had worked extensive overtime during his test period because of the Jacksonville dispatching consolidation. ATDA asserted that Barr's average monthly compensation should include all of his overtime earnings during the twelve-month test period. CSXT responded that arbitrators under both the *New York Dock* Conditions and under *New York Dock*'s predecessors had determined that average monthly compensation does not include extraordinary, transaction-related overtime earnings. Pet. App. 70a-72a.

2. *Initial Proceedings Before the Commission and the Court of Appeals.* ATDA did not initially invoke arbitration to resolve Barr's dispute, notwithstanding the fact that the *New York Dock* Conditions provide for arbitration "with respect to the interpretation, application or enforcement of any provision" of the conditions. *New York Dock* Art. I, § 11(a); CSXT Brief in Opp. App. A at 1a. Instead, ATDA asked the Commission to resolve the dispute itself.

The Commission dismissed ATDA's complaint, ruling that the dispute initially should be submitted to arbitration. Pet. App. 39a. The Commission found that ATDA's complaint presented "essentially a factual matter" involving the "calculation of individual benefits, for a defined and limited group, under the *New York Dock* conditions" and, thus, fell "within an arbitrator's special dispute resolution role under Commission-imposed labor protection." Pet. App. 45a. The Commission noted that arbitrators under the *New York Dock* Conditions and related labor protection agreements had dealt with the issue of how overtime earnings should be treated in computing "average monthly compensation" and found that "[t]hese arbitration awards demonstrate that arbitrators have the necessary knowledge and experience of industry practice, and are capable of applying both to resolve similar types of disputes whether they arise under *New York Dock* or elsewhere." Pet. App. 44a.

ATDA asked the D. C. Circuit to review the Commission's referral of the dispute to arbitration. On November 22, 1991, the Court of Appeals ruled that ATDA was not seeking review of a final order of the Commission and, accordingly, dismissed ATDA's petition as premature. *American Train Dispatchers Assn. v. ICC*, 949 F.2d 413 (D.C. Cir. 1991); Pet. App. 35a.

3. *The Arbitration Proceedings.* ATDA thereupon commenced the *New York Dock* arbitration process. Hugh Duffy was

appointed by the National Mediation Board as the chairman and neutral member of the arbitration committee and issued the committee's opinion and award. Chairman Duffy summarized the dispute as follows:

> The Carrier contends that the "average monthly compensation" computation under Section 5(a) must be adjusted to reflect any transaction-related overtime. The Organization contends that the literal terms of Section 5(a), i.e., "total compensation received", do not allow for such an exclusion.

Pet. App. 63a. He noted that the parties had agreed to have the arbitration committee resolve the specific dispute involving employee Barr "in order to provide guidance to the parties in resolving a large number of similar disputes on the property." *Ibid.*

Chairman Duffy found that, during the twelve-month period covered by Barr's test period average, Barr's overtime earnings represented "extraordinary overtime earnings attributable to the Jacksonville transaction;" "[h]ad the Jacksonville transaction not occurred, he may have earned regular, recurring or casual overtime but, as demonstrated by a review of the comparison period properly used by the Carrier, not this amount of extraordinary overtime." Pet. App. 80a-81a.

Chairman Duffy reviewed the history of displacement allowances under the Washington Job Protection Agreement ("WJPA") and various ICC labor protective conditions, which were modeled after the WJPA. He found that there are "inherent ambiguities" in the term "total compensation," first as used in WJPA and later in the Commission's conditions. Pet. App. 76a. Chairman Duffy then reviewed the numerous

arbitration decisions issued under WJPA and other labor protective conditions that had addressed the issue of extraordinary, transaction-related overtime in the computation of a test period average. Pet. App. 76a-80a. He concluded, "It can thus fairly be stated that the preponderance of decisions by Arbitrators requires that transaction-related overtime should be excluded from the computation." Pet. App. 80a. He found that these decisions were based on a sound underlying rationale: "i.e., that the purpose of employee protective provisions is to protect an employee's normal earnings, but not to present an opportunity to obtain a windfall for the entire protective period." *Ibid.* On the basis of the "great weight of arbitral authority", Chairman Duffy concluded that CSXT had properly adjusted Barr's average monthly compensation to "exclude extraordinary overtime earnings attributable to the Jacksonville transaction, and that the claim of Barr must therefore be denied." Pet. App. 81a.

4. *The Commission's Review of the Arbitration Award.* ATDA appealed the Duffy arbitration award to the ICC. *American Train Dispatchers Assn. v. CSX Transp., Inc.*, 9 I.C.C.2d 1127 (1993); Pet. App. 50a. The Commission reaffirmed its prior ruling referring the dispute to arbitration. 9 I.C.C.2d at 1130; Pet. App. 53a. It then reviewed the Duffy award under the judicially approved standards it had previously established in *Chicago & N.W. Transp. Co.–Abandonment*, 3 I.C.C.2d 729, 735-36 (1987) ("*Lace Curtain*"), *aff'd sub nom. International Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988).

The Commission ruled that ATDA had failed to show that the Duffy award was in error under these established standards. 9 I.C.C.2d at 1135; Pet. App. 61a. In particular, the Commission rejected ATDA's contention that the arbitration committee had erred in allegedly failing to follow the "plain

meaning" of Article I, § 5(a) because that provision needed to be interpreted in light of other provisions in the conditions and the underlying purposes of the conditions as a whole:

> [W]here the provision in dispute is ambiguous or contrary to other provisions, consideration of the underlying policies and purposes of a statute, rule, or contract is proper. We agree with the Committee that the terms "total compensation" and "total time," if applied literally in the context of transaction-related overtime, would be contradicted by the overall policy of *New York Dock* and its predecessors that employees be protected only against those losses that are caused by the transaction. *See e.g., New York Dock* article I, § 1(b), "Displaced employee." An employee does not lose, "as a result of the transaction," that which he would never have had but for the transaction. Indeed, a "plain meaning" interpretation of total compensation and total time would "ignore the plain language of" *New York Dock*. [*United Paperworkers Int'l Union v.*] *Misco*, [484 U.S. 29, 38 (1987),] *supra*.

9 I.C.C.2d at 1134; Pet. App. 59a.

5. *The Court of Appeals Decision.* ATDA petitioned the United States Court of Appeals for the D.C. Circuit for review of the Commission's decision. The court panel unanimously ruled that the Commission had properly referred the dispute to arbitration and that the Commission adequately had explained why it had not resolved the dispute itself in the first instance as it had done in a prior case[2] that had arisen before the

---

[2] *Great N. Pac.–Merger–Great N.*, Fin. Doc. No. 21478 (Sub-No. 6)(served Dec. 11, 1986 & April 5, 1988), *aff'd sub nom. Landis v. Burlington N. R.R.*, 930 F.2d 748 (9th Cir. 1991).

Commission had established its judicially approved policy of referring disputes to initial arbitration with subsequent Commission review. Pet. App. 6a-8a.

The panel majority (Rogers and Randolph, JJ.) also affirmed the Commission's decision on the merits, finding that the Commission's affirmance of the Duffy Award had not been arbitrary, capricious, or otherwise not in accordance with law. The majority ruled that the Commission's interpretation of its *New York Dock* Conditions was entitled to substantial deference because the literal meaning of the phrase "total compensation" was ambiguous in light of the design of *New York Dock* as a whole and the narrow definition of "displaced employee" found in § 1(b). Pet. App. 13a-14a. The majority concluded that "the exclusion of transacted-related overtime reasonably comports with the context and purpose of the conditions as a whole" (Pet. App. 14a) and with the decisions of most arbitrators under *New York Dock* and its progenitor, the Washington Job Protection Agreement of 1936. Pet. App. 17a. The dissenting judge (Wald, J.) concluded that the Commission's interpretation was not entitled to deference because it "flatly contradicts the only sensible reading of an unambiguous regulation," citing *Thomas Jefferson Univ. v. Shalala*, 114 S.Ct. 2381, 2386 (1994). Pet. App. 22a.

SUMMARY OF THE ARGUMENT

Petitioner has not demonstrated any reason for this Court to expend its scarce resources on this matter. ATDA has not identified any conflict between the decision below and that of any other Court of Appeals or of this Court. Nor has ATDA demonstrated that this case presents an unsettled and important issue of federal law. The court below simply applied established principles from this Court's opinions in affirming (a) the Interstate Commerce Commission's decision to refer the ATDA-

CSXT dispute to arbitration in the first instance and (b) the Commission's substantive interpretation of its own *New York Dock* labor protective conditions.

REASONS FOR DENYING THE WRIT

I.

ATDA HAS NOT IDENTIFIED ANY ISSUE CONCERNING THE COMMISSION'S INITIAL REFERRAL OF THIS DISPUTE TO ARBITRATION THAT WARRANTS THIS COURT'S REVIEW

ATDA and CSXT have a dispute over the proper interpretation and application of the phrase "average monthly compensation" in the ICC's *New York Dock* Conditions. The Commission ruled that this matter should be resolved in the first instance through arbitration, as expressly provided in Article I, Section 11 of the conditions. CSXT Brief in Opp., App. A at 1a.

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (CSXT Brief in Opp. App. A, at 3a), ATDA has the heavy burden of establishing that the Commission's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. As long as the Commission considered all relevant factors and provided a reasoned explanation for its decision, its decision must be affirmed. *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This Court has established that agencies are entitled to particular deference in determining the procedures they utilize in carrying out their statutory missions:

> Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *FCC v. Schreiber*, 381 U.S. [279], at 290 [1965], quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. [134], at 143 [1940]. Indeed, our cases could hardly be more explicit in this regard.

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-44 (1978). This Court has declared that "'[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules ... when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.'" *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970), *quoting NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953).

ATDA has not identified any provision in either the Interstate Commerce Act or the *New York Dock* Conditions that required the Commission to resolve this dispute in the first instance. The ICC has long relied on the special expertise possessed by labor arbitrators to resolve disputes arising under its labor protective conditions, as it explained in *Lace Curtain*, 3 I.C.C.2d at 735-36:

> The arbitrator is not confined to the express provisions of collective bargaining agreements, but may also consider his personal knowledge of the practices of the

> industry, even though they are not expressed specifically in the agreement itself. His analysis of a grievance, therefore, will involve additional factors such as productivity, morale, and whether his decision will heighten or diminish tensions. The personal knowledge of the arbitrator, particularly or industry and labor practices, thus gives him special experience and competence in resolving disputes. ...
>
> ... Arbitrators are most familiar with the complexities of labor law and peculiarities of disputes involving railroad employees. ... We also recognize the arbitrators' special role in resolving disputes exercising authority derived from the protection conditions we impose and in using their knowledge and experience of industry practices in interpreting the conditions.

See also Brotherhood of Loco. Eng'rs v. Chicago & N.W. Transp. Co., 366 I.C.C. 857, 860-61 (1983); *Bell v. Western Md. Ry.*, 366 I.C.C. 64, 67 (1981); *Leavens v. Burlington N., Inc.*, 348 I.C.C. 962, 979 (1977); *Cooper v. Penn Cent. Transp. Co.*, 342 I.C.C. 459, 463-64 (1972).

The Commission has chosen to rely on arbitration because arbitrators are "most familiar with the complexities of labor law and the peculiar problems associated with railroad employees". *Leavens*, 348 I.C.C. at 975. Accordingly, the Commission has chosen to defer all manner of disputes over the meaning of its labor conditions to arbitration because the conditions can then be interpreted in light of the arbitrators' recognized "knowledge and experience of industry practices." *Lace Curtain*, 3 I.C.C. 2d at 736.

The lower federal courts have consistently approved the Commission's use of arbitration to resolve disputes arising under

its labor conditions. *Brotherhood of Maint. of Way Emp. v. ICC*, 920 F.2d 40, 45 (D.C. Cir. 1990) (approving ICC practice of deferring issues arising under labor conditions to arbitration); *United Transp. Union v. United States*, 905 F.2d 463, 470 (D.C. Cir. 1990) (Commission's established "policy" of refusing to consider arbitrable issues until it receives an appeal from an arbitral award is "well within the expertise of the Commission"); *International Broth. of Elec. Workers*, 862 F.2d at 336 (Commission's use of arbitration to resolve disputes over employee protective conditions was "within its sound discretion"); *Brotherhood of Loco. Eng'rs v. ICC*, 808 F.2d 1570 (D.C. Cir. 1987) ("Arbitration is a legitimate method of resolving labor disputes and does not divest the Commission of its jurisdiction."); *see also Walsh v. United States*, 723 F.2d 570, 573-75 (7th Cir. 1983) (affirming ICC order dismissing petition claiming violation of *New York Dock* Conditions on ground that such disputes must be resolved through arbitration); *Southern Pacific Transp. Co. v. Young*, 890 F.2d 777, 781 (5th Cir. 1989) ("The goal of judicial economy is further advanced by deferring to the expertise of the [ICC labor conditions] arbitrator who is peculiarly competent to unravel complex disputes"). ATDA has not cited any contrary authority.

The court below properly determined that the Commission's decision to adhere to its consistently applied and judicially approved policy of requiring arbitration of disputes over the interpretation of its *New York Dock* Conditions was neither

arbitrary, capricious, nor an abuse of discretion.[3] ATDA has presented no reason why this Court should consider this issue.

II.

THE ICC PROPERLY DETERMINED THAT TRANSACTION-RELATED OVERTIME EARNINGS SHOULD BE EXCLUDED FROM THE CALCULATION OF DISPLACEMENT ALLOWANCES UNDER THE COMMISSION'S *NEW YORK DOCK* CONDITIONS

As the majority in the court below acknowledged, the Commission's interpretation of its *New York Dock* conditions is entitled to "substantial deference." Pet. App. 9a, *quoting Lyng v. Payne*, 476 U.S. 926, 939 (1986). The Commission's interpretation must be upheld so long as it is "reasonable" and "sensibly conforms to the purpose and wording of the regulations." *Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991), *quoting Ehlert v. United States*, 402 U.S. 99, 105 (1971), and *Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975). This case involves nothing more than a routine application of these well-settled principles.

---

[3] In any event, ATDA has not identified any prejudice (much less the "substantial prejudice" required by this Court in *American Farm Lines, supra*) that it or its members have suffered as a result of ICC's referral to arbitration. ATDA asserts that, because the Commission will not review arbitrators' determinations of factual issues, an alleged error that occurred in computing Barr's average earnings was not corrected. Pet. at 14. But ATDA acknowledges that the Commission could have appointed an administrative law judge to resolve disputed factual issues rather than conducting such a hearing itself in the first instance. *Ibid.*

Both the Commission and the majority below correctly found that the approach, analysis, and conclusions of the Duffy Award are consistent with both the fundamental policies underlying the *New York Dock* Conditions and a long series of arbitration awards under *New York Dock* and its predecessors that have held, with virtual unanimity, that it is appropriate to remove extraordinary transaction-related overtime hours in computing an employee's "average monthly compensation."

The *New York Dock* Conditions have their genesis in the Washington Job Protection Agreement of 1936 ("WJPA"). *See, e.g., Southern Ry.–Control–Central of Ga. Ry.*, 331 I.C.C. 151, 158 (1967). Even prior to the passage of the Transportation Act of 1940, which first required the ICC to impose labor protective conditions modeled on the WJPA, the Commission had conditioned its approval of carrier consolidations on the provision of income protections for affected employees modeled after WJPA. *See, e.g., Chicago, R. I. & G. Ry. Co. Trustees Lease*, 230 I.C.C. 181, 185-90 (1938). A consistent feature of those protective conditions has been the protection of the earnings of employees who remain actively employed by the consolidating carriers after the transaction but who, because of the consolidation, have been displaced into lower paying positions.[4]

The underlying justification for providing displaced employees with income protection has been to ensure that the employees not suffer reductions in earnings because of the approved transaction from levels they otherwise would have received in the absence of such transaction. "We are simply

---

[4] *See* WJPA § 6; *Chicago, R. I. & G. Ry. Co. Trustees Lease*, 230 I.C.C. at 187-88; *Oklahoma Ry. Co. Trustees Abandonment of Operations*, 257 I.C.C. 177, 197-98 (1944); *Southern Ry.–Control–Central of Ga. Ry.*, 317 I.C.C. 557, 589 (1962); *New York Dock Ry.–Control–Brooklyn Eastern Dist. Term.*, 360 I.C.C. at 86.

attempting in the public interest reasonably to protect those employees of the applicants *who may be adversely affected economically by the grant of authority herein* ...." *Chicago, R. I. & G. Ry. Co. Trustees Lease*, 233 I.C.C. 21, 26 (1939); emphasis added. As this Court explained in *United States v. Lowden*, 308 U.S. 225, 234 (1939), in which the Commission's inherent authority to impose labor protection was upheld, the Commission's responsibility to determine whether consolidations are in the public interest authorizes the "just and reasonable treatment of railroad employees *in mitigation of the hardship imposed on them* in carrying out the national policy of railway consolidation ...." Emphasis added. The Court noted that the then-pending legislation that was to become the Transportation Act of 1940 showed that Congress intended that "fair and equitable provision [be made] for the compensation of losses thrown upon employees *as the result of an authorized consolidation* ...." *Id.* at 238; emphasis added. Thus, the displacement allowance provided in Article I, Section 5 of *New York Dock* is intended to ensure that employees are not deprived, as a result of a carrier consolidation, of the level of earnings that they otherwise likely would have achieved had the transaction never occurred. *Southern Ry.--Control--Central of Ga. Ry.*, 317 I.C.C. at 568 ("Both the statute and the condition mean what is literally stated; i.e., that an employee is protected against adverse effects suffered in his employment *as a result of the transaction*." (Emphasis added)).

The displacement allowance provided in ICC labor conditions was never intended to provide an affected employee with a windfall by guaranteeing a higher level of compensation than otherwise would have been earned had the transaction never taken place. *Cf. Southern Ry.--Control--Central of Ga. Ry.*, 317 I.C.C. 729, 730-31 (1963) ("Before an employee is entitled to such benefits, there must be a reasonably direct causal connection between the transaction and the injury

sustained ...."). This fundamental policy is inherent in the definition of "displaced employee" in Article I, Section 1(b) of the *New York Dock* Conditions: "'Displaced employee' means an employee of the railroad who, *as a result of a transaction is placed in a worse position* with respect to his compensation and rules governing his working conditions." 360 I.C.C. at 84; CSXT Brief in Opp. App. A at 1a; emphasis added. Thus, while Article I, Section 5 of *New York Dock* does not expressly address the treatment of extraordinary, transaction-related overtime performed during an employee's test period, arbitrators interpreting WJPA, the *New York Dock* Conditions, and other labor protective arrangements have with virtual unanimity ruled that such overtime should be excluded, as the arbitration committee, the Commission, and the court below recognized. Pet. App. 76a-80a, 56a, 17a-20a.[5]

ATDA argues in its petition, as it did before the Court of Appeals, the Commission, and the arbitration committee, that Art. I, § 5 of *New York Dock* must be interpreted according to its "plain meaning" and that all overtime earnings during the test period must be included in the TPA, regardless of whether they were caused by the transaction itself and notwithstanding the fact that the inclusion of transaction-related overtime would place an employee in a better position than he would have occupied had the transaction never occurred. ATDA is wrong for several reasons.

First, as this Court has established, the "plain meaning" rule permits consideration of the underlying purposes, design, object, and policy of a statute where its terms are ambiguous or

---

[5] Judge Wald, in dissent, similarly acknowledged that the history of previous arbitration decisions was at variance with ATDA's interpretation of the conditions. She simply refused to follow those decisions and the arbitration committee's decision in this case because of her conclusion that *New York Dock* Art. I, § 5(a) was unambiguous. Pet. App. 29a n. 5.

where a literal interpretation of isolated language would lead to a result at variance with such purposes. *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 454 (1989)[6]; *United States v. American Trucking Assn.*, 310 U.S. 534, 542-43 (1940). ATDA's suggestion that the Commission has less authority to resolve an ambiguity in its prescribed labor protective conditions than it has in interpreting the language of a statute (or that the law requires clarification on this point) is wholly without merit or legal support. Arbitrator Duffy, the ICC, and the majority below all concluded that the terms "total compensation" and "average monthly compensation" in *New York Dock* are ambiguous with respect to the treatment of transaction-related overtime in view of the other terms in the conditions that emphasize that employees are entitled to be protected against only those income losses that are "caused by" the transaction. *New York Dock* Art. I, § 1(b) (definition of "displaced employee"); Pet. App. 76a, 59a, 13a-15a.

Second, ATDA has not identified anything in the language of Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, the statutory basis for the *New York Dock* Conditions, that requires the inclusion of extraordinary, transaction-related overtime in the computation of a test period average. That section merely requires that the Commission impose labor protective conditions at least as generous as those it had imposed prior to February 5, 1976, supplemented by the so-called Appendix C-1 Conditions. Pet. at 3. As discussed above, the Commission's then-existing labor conditions were based on,

---

[6] ATDA asserts that the court below made a "serious misquotation[] and misstatement[]" of this Court's *Public Citizen* opinion because when it inadvertently substituted the word "scheme" for the word "term" in quoting the opinion. Pet. at 16-17. ATDA's bald assertion that this substitution somehow "serve[d] to change the clear language and thrust of the Supreme Court's opinion" (Pet. at 16) is simply nonsense.

and used the terms of, the WJPA, which had consistently been interpreted by arbitrators as authorizing the exclusion of extraordinary overtime hours and earnings. Accordingly, the state of the law when ICA § 11347 was enacted was that the primary source for what became the *New York Dock* Conditions authorized the exclusion of extraordinary overtime. ATDA has offered no evidence that Congress intended any change to this settled interpretation.

Accordingly, the long line of arbitral decisions and the underlying purposes of the *New York Dock* Conditions establish that the Commission did not act arbitrarily or capriciously in affirming the arbitration committee's award. The extraordinary overtime hours CSXT excluded from its calculations would not have been worked by its employees in the absence of the transaction. As Arbitrator Duffy and the Commission found, the inclusion of such hours in the test period average computation would have resulted in a six-year undeserved windfall to the employees.[7] This Court's prior decisions establish that the court below properly deferred to the Commission's interpretation of its own conditions and that no issue worthy of this Court's consideration has been presented in ATDA's petition.

---

[7] As Judge Wald recognized in her dissent below, the formula for calculating displacement benefits may produce arguably unjust results in the case of a particular employee who either had unusual absences or worked an unusual amount of overtime during his/her test period unrelated to the consolidation transaction. Pet. App. 23a-24a. But, the fact that unusual variances in earnings may occur during a test period that are not related to the transaction does not detract from the appropriateness of eliminating the effects of the consolidation itself in estimating the earnings the employee could have been expected to receive during his/her protected period in the absence of the transaction.

CONCLUSION

Respondent CSX Transportation, Inc. prays that this Court deny the Petition for Writ of Certiorari of Petitioner American Train Dispatchers Association because the case presents no issue appropriate for the Court's review and because the holdings of the Interstate Commerce Commission and the lower court were not in error.

Respectfully submitted,

JAMES D. TOMOLA
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3674

JAMES S. WHITEHEAD
(Counsel of Record)
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

Attorneys for Respondent
CSX Transportation, Inc.

December 1995

APPENDIX

APPENDIX A

***New York Dock* Conditions, Article I, Section 1(b), 360 I.C.C. 60, 84 (1979):**

> (b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

***New York Dock* Conditions, Article I, Section 11, 360 I.C.C. 60, 87-88 (1979):**

> 11. *Arbitration of disputes.*--(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall

have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designations will be binding upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by a majority vote, of the arbitration committee shall be final and binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove

that factors other than a transaction affected the employee.

Administrative Procedure Act, 5 U.S.C. § 706(2)(A):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

****

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]